Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

No. 991.

UNITED STATES ex rel. JOHN TURNER

vs.

WILLIAM WILLIAMS, Commissioner, etc.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT ON MOTIONS TO ADMIT TO BAIL AND TO ADVANCE CAUSE FOR HEARING.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 561.

UNITED STATES ex rel. JOHN TURNER

vs.

WILLIAM WILLIAMS, Commissioner, etc.

STATEMENT OF THE CASE.

The importance of this case appropriately requires a statement of the law and the facts involved. It is conceived to be necessary to go to some extent into the merits of the case. The motion to admit to bail is more intimately connected with the merits of the case than the motion to advance the cause for hearing. The latter motion is more especially related to the circumstances in which the appellant has been placed by the authorities at Ellis Island, but is somewhat connected with the substance of the proceeding itself.

The arrest of the appellant, John Turner, and the order of his deportation were at the instance of the Secretary of Commerce and Labor, and references to the act creating the Department of Commerce and Labor and to the new immi-

gration act of March 3, 1903, will be made subsequently to elucidate the portion of this argument where it will be insisted that the Secretary of Commerce and Labor had no jurisdiction in this matter, and that the proceedings under the Secretary of Commerce and Labor against the appellant, John Turner, are absolutely null and void.

From the record now before the court it appears that the appellant, John Turner, had been in the United States for a period of about ten days at the time of his arrest; that he had come to the United States for the purpose of delivering a series of lectures upon various political and economic subjects. The record shows that the appellant has been a labor organizer; that he was until about five years ago engaged in the grocery business in and about the City of London, England; that for the last five years he has been an organizer for the Amalgamated Union of Shop Assistants and Warehousemen and Clerks of Great Britain, with headquarters located at 122 Gower street, London, England (See affidavit of John Turner); that three of his brothers reside in the United States, two in the City of Chicago, and one, Albert Turner, who is a naturalized citizen of the United States, resides at Silverton, Colorado. The appellant came to the United States for the purpose of delivering lectures and to visit with his brothers and to write articles on trade conditions in the United States for a publication known as "Grocer," published in the City of London, Eng., to which he is now, and for some time has been, a contributor.

The record does not show whether before October 23, 1903, the appellant had delivered any lectures in the United States. But on October 19, 1903, the Hon. George B. Cortelyou, Secretary of Commerce and Labor, issued his warrant, which was number 41,324, and was directed to Joseph Weldon, John

J. Willett, Edward J. Flannery, Charles H. Paul, or any of them, all United States inspectors, and which reads, so far as pertinent, as follows:

> "Whereas, from proof submitted to me, I have become satisfied that John Turner, anarchist, alien, who landed in the United States via Canada on the (exact date of admission not known) came into this country from England contrary to the prohibition of the Act of Congress approved March 3rd, 1903; and Whereas, the period of three years after landing has not elapsed I, George B. Cortelyou, Secretary of Commerce and Labor of the United States, by virtue of the power and authority invested in me by the above entitled act of Congress, do hereby command you to take into custody the said John Turner, alien, and return him to the country whence he came, at the expense of the United States. For so doing this shall be your sufficient warrant.
>
> Witness my hand and seal this 19th day of October, A. D. 1903." (See record.)

The return of the officer to the writ of *habeas corpus* below shows that a meeting was advertised by hand-bills to take place at Murray Hill Lyceum, 160-164 East 34th street, near 3d avenue, New York, Friday, October 23, at 8 P. M., and that the meeting would be addressed by the said John Turner on the subject of "Trades Unionism and the General Strike." This hand bill referred to the former visit of the appellant, John Turner, to the United States in 1897, and announced that Turner had recently refused to accept the candidacy to parliament because of his anarchistic principles. It further appears from the return of the officer and made a part of this record in this court, that Turner lectured at the place mentioned, on the evening of Friday, October 23, 1903, which was, as before seen, four days after the issuance of the warrant by the Secretary of Commerce and Labor. At the conclusion of the lecture delivered by Turner on that evening,

he was arrested, pursuant to the warrant already referred to, and at noon on Saturday, October 24, 1903, a Board of Special Inquiry appears to have been convened at the United States Emigrant Station on Ellis Island, which board was composed of Charles Semsey, chairman, Joseph Weldon and Luther C. Steward, inspectors. At this hearing an inspector by the name of John J. McKee appears to have been sworn, but by whom is not clear, and was questioned by the Commissioner. McKee, it appears, was present at the Murray Hill Lyceum meeting and took note of what Turner had said at that place and time. Inspector Weldon, a member of the Commission which tried the appellant at the immigration station, was then sworn, and it appears from his testimony that he had executed the warrant in question to arrest the said John Turner; that he had searched the person of the said Turner, and had found thereupon a copy of a paper entitled "Free Society," a periodical of anarchistic thought, work and literature published in Chicago, Illinois, and also took from his person a certain card announcing a meeting to be held on November 9, 1903, at Bronx Casino, 2994 and 2998 3d avenue, to be addressed by John Turner, on the subject of the Chicago Tragedy. The appellant, John Turner, was then affirmed, evidently having refused to be sworn, and admitted that the statement attributed to him at the Murray Hill Lyceum meeting, a transcript of which is attached to the return as "Exhibit A," was one which he very probably would make. Turner said that he did not consider himself an emigrant, and when asked by Mr. Williams, the Commissioner, whether he intended to remain in the United States any length of time, he answered "Probably for a few months. I hope to get through to see my brother who is in Colorado, to meet a number of friends here and to do some business here." There-

upon Mr. Weldon, a member of the board which passed upon Turner's acts, made the following motion:

> "Mr. Chairman: It having been shown by the evidence here, and also by the admissions made by the defendant, John Turner, that he is an anarchist, and that he is here in violation of the Act approved March 3rd, 1903, I move that he be excluded and not be permitted to land in the United States, and that he be deported.
>
> "Mr. Steward: I second the motion."

The board decided on unanimous vote, that John Turner is an alien found in the United States in violation of law, and that he be deported.

It thus appears that one of the officers who passed upon the right of the appellant to enter the United States had executed the warrant by which Turner was arrested, also testified against him at the supposed trial of Turner, and moved that he be excluded, and also voted on the order by which he was excluded.

An appeal was taken from the decision of this Board to the Secretary of Commerce and Labor, who in passing upon the appeal appears to have said, "The evidence shows that the appellant declined to give exact information as to the manner in which he secured admission to this country, although he swears that he arrived here about ten days ago. He admits that he is an anarchist and an advocate of anarchistic principles, which brings him within the class defined by Section 38 of the Act approved March 3, 1903." The appeal was therefore dismissed. As before seen, Section 38 excluded from the United States "persons who disbelieve in or who are opposed to all organized government, or who are members of or affiliated with any organized entertaining and teaching such disbelief or opposition in and to all organized government," etc.

The matters which appear to have been emphasized at the trial of Turner, if such it could be called, consist of certain pamphlets and papers, including a publication by Peter Kropotkin, which was found at the meeting at the Murray Hill Lyceum, and also certain language which was used by Turner at that meeting, which is as follows:

> "And to me at any rate, as an anarchist, as one who feels that the people must emancipate themselves I look forward to this struggle as an opportunity for the workers to assert the power that is really theirs."

This language follows certain statements made by Turner at the meeting in question with reference to the increasing power of organized labor, and to the efforts which are being made by employers towards organizing in order to crush labor unions. He predicted a general strike, and pictured to the audience the result of a general tie-up of industries in the City of New York, and he stated that all over Europe preparations for a general strike are being made, and that such a strike will spread over the entire industrial world.

The appellant, after the dismissal of his appeal to the Secretary of Commerce and Labor, sued out a writ of *habeas corpus* in the Circuit Court of the United States for the Southern District of New York, and alleged that the Act under which he was deported was contrary to the Constitution of the United States. Upon consideration of the writ of *habeas corpus*, the same having been allowed, the judge at circuit decided in favor of the constitutionality of the act of March 3, 1903, and dismissed the writ, after having issued it, and remanded the appellant to the custody of the immigration officers at Ellis Island, there to be held until the cause shall be passed upon by the Supreme Court of the United States. An appeal was taken from the decision of the Circuit Court of the United States to this court, and, as under the

circumstances this cause cannot be heard until October, 1904, or later, it was deemed necessary to apply to this court for an order permitting appellant to give bond pending this appeal, and also to advance this cause for hearing.

Affidavits which are filed in connection with the motions now made, show that the appellant is confined in the basement of the United States Immigration building on Ellis Island, in the harbor of New York; that he is kept in a steel cage, which is located fifteen or twenty feet from any window, and is allowed the sum of thirty cents a day at the restaurant with which he is able to buy ten slices of bread, two bowls of soup and coffee each day. His surroundings are such that in the interest of humanity he should not be compelled to endure them any longer than may be necessary. And it was owing to his situation that it was deemed expedient to make these motions.

Specification of Errors.

Out of the assignment of errors which have been filed in this cause it is not necessary or even proper to consider all of them at this time. They will be argued at length in the brief on the merits when the cause is finally submitted. For the present it is sufficient in our judgment in the interest of brevity to formulate from the assignment of errors three propositions under which the questions bearing most forcibly upon these motions may be discussed.

First. Was not the act of February 14, 1903, repealed by the act of March 3, 1903; and were not the proceedings by and under the Secretary of Commerce and Labor without law and void?

Second. Has the Federal government under any of its powers either expressed or implied, either clear or specula-

tive any power to exclude any alien from the United States because of his beliefs on the subject of government or any other subject?

Third. Does not the act of March 3, 1903, strike at the right of the people to assemble and at the right of free speech; at the right of a grand jury presentment; at the right of a public trial before a jury; at the right of being confronted by the witnesses; at the right of knowing the nature of the accusation; at the right of having counsel; at the right of procuring witnesses in the prisoner's own behalf, and at the very form and essence of Liberty itself?

ARGUMENT.

I.

WAS NOT THE ACT OF FEBRUARY 14, 1903, REPEALED BY THE ACT OF MARCH 3, 1903; AND WERE NOT THE PROCEEDINGS BY AND UNDER THE SECRETARY OF COMMERCE AND LABOR WITHOUT LAW AND VOID?

Even if the law under which the appellant, John Turner, was ordered to be deported, be a constitutional enactment, the validity of the proceedings against the appellant and the legality of his detention are overthrown by the palpable repugnance between the acts of February 14, 1903, and March 3, 1903, as already adverted to in the statement of the case.

Moreover, the 36th section of the Immigration Act, passed March 3, 1903, provides

> "That all acts and parts of acts inconsistent with this act are hereby repealed: Provided, that this act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent." (Compiled Stat. of 1903, p. 185.)

The Act of February 14, 1903, creating the Department of Commerce and Labor, purports to transfer to that department the service, among others, of the Commissioner General of Immigration, the Commissioner of Immigration, the Bureau of Immigration and the immigration at large. (Sec. 4, Comp. Stat. of 1903, p. 43.)

Section 10 purports to confer all power upon the Secretary of Commerce and Labor, which hitherto existed in the head of any other department so transferred. The latter par-

agraph of this section specifically enumerates, however, certain specific powers relating to the details of various service, which are transferred to the Department of Commerce and Labor. This is the whole of the act of February 14, 1903, so far as pertinent to the present discussion.

On the other hand the new Immigration Act, passed March 3, 1903, descends into the details of the regulation of immigration. Section 1 provides for the collection of head money, to be paid into the United States treasury, and provides that it shall be disbursed under the direction of the Secretary of the Treasury. It empowers the Commissioner General of Immigration, under the direction of the Secretary of the Treasury, to compromise any lien created by the section against vessels on account of such head money. Sections 2 to 18, inclusive, specify the aliens excluded, the penalties for bringing in excluded aliens, and certain regulations not necessary to detail now. Section 19 provides for immediate deportation of any alien who unlawfully comes into the United States. It empowers the Commissioner General of Immigration, with the approval of the Secretary of the Treasury, to suspend the deportation of any alien and for his support out of the "immigration fund" accumulated as hereinbefore detailed out of the head money collected and which is under the control of the Secretary of the Treasury.

Section 21 empowers the Secretary of the Treasury to deport any inadmissible alien within three years after he may have landed in the United States.

Section 22 empowers the Commissioner General of Immigration, under the direction of the Secretary of the Treasury, to have charge "of the administration of all laws relating to the immigration of aliens." The Commissioner, with the approval of the Secretary of the Treasury, may detail immigration officers for temporary service in foreign countries.

Section 24 empowers the Secretary of the Treasury to appoint immigrant inspectors, officers, clerks and employes and to fix their compensation, while Section 23 empowers the Secretary of the Treasury to prescribe the duties of the Commissioner of Immigration.

Section 25 provides for appeals by aliens to the Secretary of the Treasury from decisions of the Commissioner of Immigration, whose decision shall be final.

And as before seen, Section 36 repeals all acts or parts of acts inconsistent with this act.

Now, the warrant upon which the appellant was arrested was issued by the Secretary of Commerce and Labor. The appellant was tried by a board presumably operating in conjunction with the Department of Commerce and Labor. The whole field of jurisdiction seems to have been taken by the Department of Commerce and Labor.

The warrant of the Secretary of Commerce and Labor recited that the appellant was in the United States "contrary to the prohibition of the act of Congress, approved March 3, 1903," and that "the period of three years after landing has not elapsed." The order of the Secretary of Commerce and Labor dismissing Turner's appeal found that "he is an anarchist and an advocate of anarchistic principles, which bring him within the class defined by Section 38 of the act approved March 3, 1903." So that the Secretary of Commerce and Labor looked to an act for his authority which in every provision contemplates that the Secretary of the Treasury shall exercise it. It is an act, too, which by express terms repeals all acts and parts of acts inconsistent with it. This repeal relates undoubtedly to the immigration service which by the previous act of February 14 had been transferred to the Department of Commerce and Labor.

The act of March 3, 1903, went into force on March 3, 1903. "When no other time is fixed a statute takes effect from the date of its passage—from the date of the last act necessary to give a bill the force of law."

Sutherland on Stat. Const., Sec. 104.
Matthews v. *Jane*, 7 Wheat., 164.
Louisville v. *Bank*, 104 U. S., 469.

It is true that the act of February 14, 1903, did not go into effect until July 1, 1903, except as to the transfer of offices, bureaus, etc., engaged in whole or in part in statistical or scientific work. (Sec. 12.) We need not assume now to say whether Section 12 may be construed to pass over to the Secretary of Commerce and Labor the immigration service under the immediate force clause of Section 13. The fact that the act of March 3, 1903, by operation of law, went immediately into effect and the act of February 14, 1903, did not go into effect until July 1, 1903, avails nothing in a legal sense. The act of March 3, 1903, expresses the later legislative will and explicitly repeals all other laws inconsistent with it. Its terms are hopelessly opposed to the terms of the act of February 14, 1903. The provisions of the two acts are palpably repugnant. Both cannot stand.

> "Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together."
>
> Sutherland on Stat. Const., Sec. 138.

See

Murdock v. *Mayor of Memphis*, 20 Wall., 590.
U. S. v. *Tynen*, 11 Wall., 88.
Brown v. *U. S.*, 171 U. S., 629.

Mr. Sutherland in his work on Statutory Construction, Sec. 140, used this language:

> "In organizing the powers of government there is a definite and precise scheme or plan and a unity and singleness of means employed to carry it into effect. There is but one chief magistrate, one legislature, one judiciary. There is but one revenue system, one police system. Public duties are defined and imposed by officers designated with certainty without duplication or confusion, except by inadvertence. The exercise of power by one over another must be authorized by law; its possession and scope will be such as is granted; when granted if the mode of its exercise be also prescribed it must be followed.
>
> In the grant and in the regulation of the mode of exercise there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode."

In Section 399 the same author used this language:

> "When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act."

In Section 137 the same author uses this language:

> "A repeal will take effect from any subsequent statute in which the legislature gives a clear expression of its will for that purpose. * * * Where a statute repeals all former laws within its purview the intention is obvious and is readily recognized to sweep away all existing laws upon the subjects with which the repealing act deals."

Upon the two-fold ground of express repeal and clear repugnance between the two acts we urge the invalidity of the proceedings against the appellant by the department of commerce and labor. The warrant issued by the secretary of com-

merce and labor is the foundation of the appellant's detention. That warrant directs certain immigration inspectors to take "the said John Turner, alien, and return him to the country whence he came." By the order of October 26, 1903, the secretary of commerce and labor directed that Turner's appeal be "dismissed and you are directed to deport the said John Turner in conformity with warrant now in your hands for execution." Pursuant to these acts of the secretary of commerce and labor the appellant was held in custody at the time of the issuance of the writ of *habeas corpus*. Under these same acts he is still held in custody.

The subject affords opportunity for more comprehensive discussion than seems now appropriate to the motions presented. The principles invoked are, however, fundamental. Their uniform recognition may be shown by amplifying the citation of authorities, without at all adding to their inherent force. This court grants the writ of *habeas corpus* in favor of liberty. If the appellant's detention is unlawful for the reasons now suggested, it is just as unlawful as if he were held by an unauthorized proclamation of an executive officer, whether high or low. It would not be pretended for a moment that he could be imprisoned upon the order of an interstate commerce commissioner, or upon the order of a superintendent of the mint. Now, as the whole immigration service was taken from the department of commerce and labor and placed with the department of the treasury where it hitherto had been, can it be said that the actions of the secretary of commerce and labor are other than null and void?

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II.

HAS THE FEDERAL GOVERNMENT UNDER ANY OF ITS POWERS, EITHER EXPRESSED OR IMPLIED, EITHER CLEAR OR SPECULATIVE, ANY POWER TO EXCLUDE AN ALIEN FROM THE UNITED STATES BECAUSE OF HIS BELIEFS ON THE SUBJECT OF GOVERNMENT OR ANY OTHER SUBJECT?

As already seen, the secretary of commerce and labor based his order of deportation upon the 38th section of the "Immigration Act" of March 3, 1903. This reads: "That no person who disbelieves in or who is opposed to all organized government, etc., shall be permitted to enter the United States., or any territory or place subject to the jurisdiction thereof." An alien may believe in monarchy and be admitted to advocate its principles. He may believe in resurrecting Byzantinism in its most hateful forms, and be admitted to preach its doctrines. These principles and doctrines are inimical to the republican system which all Americans fondly cherish. Monocrats disbelieve in the republican system, yet they may freely enter the United States. This is mentioned only to evidence the spirit of this law. For by what process of reasoning can the Federal Government be held to have control over the beliefs of persons under it or who seek to come under it? That question was settled when this republic was founded. At that time the Anglo-Saxon race had completed one of its most remarkable cycles. Freedom of belief, freedom of speech and of the press had triumphed over the Stuarts. The Bill of Rights had been engrafted upon the English constitution through the revolution of 1688 and the influence of William III. Shall these rights remain settled; or are they

subject to every passing spasm of alarm? It is true that the word "anarchy" is ominous.

But so was the word "dissenter" and the word "nonjuror," Presbyterian and heretic ominous. The word "republican" was hateful to James II. "Whig" and "whiggery" have been symbols of scoffing and reproach. But the question is not of the rightfulness of any belief. If it were, some one has the power to decide that question. That conceded freedom of belief and of speech falls. Because when governments in times past held that it was wrong to be a dissenter, or a republican, when the reformation was branded as wicked and revolutionary, there was coupled with such judgment the power to proscribe their adherents. Governments always have the power to eradicate the wrong. By placing themselves on the side of what is right and against what is wrong, that is, by prejudging these questions they have managed in all ages to neutralize the very opposition of liberty herself. An administrative process like this which commits to the constabulary the power so to construe the law as to exclude from our shores such men as Herbert Spencer or Count Tolstoi in order that discussion as to the limits of government or the abolition of government may be repressed cannot be said to be consonant to the constitution of a republic "conceived in liberty."

> "To call any proposition certain while there is anyone who would deny its certainty if permitted, but who is not permitted, is to announce that we ourselves and those who agree with us are the judges of certainty and judges without hearing the other side."

In that admirable essay "Liberty," by John Stuart Mill we find the following principles announced:

> "First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be

true. To deny this is to assume our own infallibility.

Secondly, though the silent opinion be an error, it may, and very commonly does contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinion that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of vital effect being lost, or enfeebled, and deprived of its vital effect on the character and conduct the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience."

We submit that nothing can conduce more to the permanency of the republican system of the United States than a free opportunity to know through the avenues of discussion and literature that neither monarchy nor anarchy are comparable to the repulican system in which the liberty of each man is limited only by the like liberty of all men and that limitation preserved by firm and incorruptible authority. No one claims or can claim upon this record that the appellant has advocated the overthrow of this or any other government, or that he has advocated at any time the assassination of any of the officials of this or any other government. Still less can it be claimed that he harbors opinions that these things are permissible and right. He has been excluded because he "disbelieves" in government. And even if after arriving on these shores he had advocated assassination, upon what jurisdiction would devolve the duty of deal-

ing with him? We candidly submit that in this policy there is comprised such a confusion of thought upon the nature of our federal system as to awaken wonder if clear thinking upon state and federal authority is possible in moments of legislative zeal. Upon what construction of the Constitution may the federal arm reach over into the territory of a sovereign state and seize one of its denizens or sojourners and transport him to a distant land? Under this law this might be done at any time within three years, though the person may have in the meantime taken steps to be naturalized and have become settled in business and become one of the supporters of the state government. The regulation of commerce with foreign nations or between the several states has never extended beyond the moment when the subject became massed with the personal property of the state. This is the limit of judicial construction. An alien is a "broken package" as soon as he is commingled with the people of a state.

During the excitement of the French revolution Great Britain, in spite of the protests of such intellects as Lord Landsdowne, Mr. Fox, Mr. Sheridan and Mr. Grey, fell into one of the lowest states of obscurantism which it ever reached. The act of Congress now before the court bears many resemblances to the laws then enacted. Mr. Fox denounced them as "utterly irreconcilable with the principles of the constitution." As to the power given to the secretary of state to deport foreigners, Mr. Grey said that it was a "measure of oppression" and gave "power for the exercise of which no mean was responsible." Where is the responsibility when an alien may be deported from the United States by a board whose members are appointed by an executive secretary; *whose members may be sheriffs,*

judges, witnesses and executioners by turns, as this present record shows was the case with this appellant?

If in a monarchial country having no written constitution an alien law similar to the one here is "utterly irreconcilable with the privileges of the constitution," much more can it be said that the present law is utterly irreconcilable with the privileges of a written constitution ordained "to establish justice" and to secure the blessings of liberty to ourselves and our posterity."

> "Happy, thrice happy," said General Washington, "shall they be pronounced hereafter who have contributed anything in erecting this stupendous fabric of freedom and empire; who have assisted in protecting the rights of human nature, and establishing an asylum for the poor and oppressed of all nations and religions."
>
> Bancroft's History of the Constitution, Vol. 1, p. 101.

But the "Alein and Sedition" laws were passed during the life of Washington himself. Such are the actions and the reactions of nations. The history of these laws is known to all. The reasonings of Mr. Madison, the "father of the constitution" upon the Alien and Sedition Acts, bear directly upon the act of March 3, 1893. The "Alien and Sedition" Acts were passed with the professed object of sending from the territory of the United States such persons "as may be dangerous to its peace and safety" and to prevent false, scandalous and malicious writings against the United States, either house of congress or the president so as to bring them or either of them into contempt or disrepute. These objects are laudable enough. And so it can be said by way of popular appeal that the professed object of the law of 1903, is laudable. But this is an irrelevant conclusion. Such claims are beside the point. We are brought then to the question

whether the law of 1903, is constitional, that is, whether the Congress had the constitutional power to enact it. The exclusion acts whether relating to Chinese, paupers, idiots or other classes of persons rests upon a precarious foundation. In the debates in Congress in 1798, upon the Alien Act then depending Mr. Tazewell a member said that he knew but of one power given to Congress by the constitution which could exclusively apply to aliens and that was the power of naturalization which could only authorize Congress to give or withhold citizenship.

Elliott's Debates, Vol IV, p. 440.

The opinion of Mr. Jefferson set out in the Kentucky resolutions are familiar, and in the interests of brevity will not be dwelt upon at this time.

But the power to exclude aliens has been predicted either upon the sovereignity of the United States, or its power as a nation which is another way of stating the same thing; or upon the commerce clause of the constitution itself. As to the first, sovereignity does not inhere in the United States government, nor in Congress. Sovereignty or the paramount power resides ultimately with the people under our systems and the constitution expresses the sovereign powers of agency which have been committed to the Federal Government. To base the power to exclude aliens either upon the sovereignity of the United States or upon their character as a nation is to leave the middle term of the implied syllogism undistributed. For it is well known as well from the repeated decisions of this court as from the constitution itself, particularly the tenth amendment, that the United States have only such power as the constitution expresses or such power as flows from necessary implication from expressed powers. The

tenth amendment among others, resulted from the resolutions of the states which originally acceded to the constitution requiring the constitution to express that all powers not conferred were reserved to the states or the people. These considerations need not be amplified upon these motions and are only suggested now because they tend to place the law of 1903, in the light of historic truth. The ground, however, upon which previous exclusion acts have been validated was furnished by the commerce clause of the constitution and to the interpretation put upon that clause by Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat., 1.

Yet the only thing decided in this case was that commerce includes navigation. It is true that the chief justice defined commerce so comprehensively as to include other subjects, but these other subjects were not before the court. His definition of commerce, except so far as he held it to embrace "navigation," commends itself not as authority, but as his individual idea of the subject. In fact, the decision explains its own definite authority in this language:

> "The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not and cannot be raised in this case."

The rule is well known. Chance expressions outside of the case do not bind. We submit that the commerce clause has received the utmost limit of construction. So far as it relates to other exclusion acts, the interest here is only academic. But this bring us to the point as to whether the most fanciful interpretation of the right to regulate commerce can extend to the development of power to exclude aliens for beliefs or disbeliefs in government or any other subject. For if an alien can be excluded for his

beliefs or disbeliefs in government, he can be excluded for his beliefs or disbeliefs in religion, science or philosophy. The reason for exclusion upon these grounds can be as well raised in some necessity evoked for the occasion, as upon the ground for beliefs or disbeliefs in government. What sovereignty outside of the constituent sovereignty of the English Parliament can do this? What stretch of the commerce clause which does not clearly exhibit a transparent fallacy can do this? This subject will be discussed at large in the argument proper. For the sake of illustration, let a few supposable cases be cited. If some religious denomination should obtain the political mastery of this country, it might well occur to it that all other religious sects were inimical to its power and prestige. In such a condition of society laws veiled with pretensions of public welfare, but actually directed toward preserving the existing order, would not be attacked by the party of stability. So that an act might be passed excluding from these shores all persons who disbelieved in the creed of that denomination. If the right to exclude any or all aliens depends upon the sovereign character of the general government or upon the commerce clause of the Constitution, would it avail anything to urge that the first amendment of the Constitution provides that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"? The whole argument is closed when it is asserted that the right to exclude is traceable to sovereignty or the commerce clause. With the closing of the argument the first amendment to the Constitution becomes futile. So it might be said that the suppositious law did not respect an establishment of religion or prohibit the free exercise thereof. It might be said nothing is done to establish any religion;

nothing is done prohibiting the free exercise thereof. And yet it would be obvious to anyone that the Constitution had been nullified by indirection. Can anything be plainer than this, that "an administrative process" which should prevent any religious denomination, except one, from being recruited by adherents from foreign lands would presently and ultimately affect the free exercise of religion? Did not our ancestors come to these shores for religious liberty; and if others might not, because of religious belief, come now to join their descendants, would not religious liberty be vitally attacked? The possible cases suggest themselves on all sides and run into all shades of contradiction and absurdity. Or, suppose that Congress should enact a law that no one should be admitted to the United States who disbelieved in our present revenue system, or believed in the theory of single tax, or disbelieved in monogamy, or who came for the purpose of writing or speaking on his beliefs or disbeliefs touching any of these subjects, who would pretend that the law could be justified in the commerce clause of the Constitution, or validated by the sovereign character of the general government? Can there be the slightest doubt that such laws would abridge the freedom of speech and of the press? Abridge means to shorten or diminish and not to abolish or destroy? The first amendment to the Constitution can by no construction be held to limit Congress in a particular way or as to a particular place. It limits Congress absolutely; for it reads, "Congress shall make *no law* * * * abridging the freedom of speech, or of the press."

The distinguished judge at circuit held in this case:

> "As to abridgement of the freedom of speech, that clause deals with the speech of persons in the United

> States, and has no bearing upon the question what persons shall be allowed to enter therein." (Fed. Rep., Adv. Sheets, Jan. 28, 1904, 253.

But if this be true, then any paramount party devoted to any particular belief can through the agency of the government exclude all aliens who come here to lecture or to be citizens, because of their disbelief in the belief of such party or because of their belief in something else. Does not this legitimate reduction of the argument show the whole position to be fallacious? A construction which lifts the commerce clause of the Constitution and the metaphysical sovereignty of the general government over an express amendment procured by the original states out of the abundance of caution cannot stand the verdict of history.

To interfere with beliefs necessarily interferes with their expression. In the present case the appellant was arrested at the close of a lecture, and extracts of that lecture were embodied in the record at the hearing before the navigation board and emphasized as a ground of action.

III.

DOES NOT THE ACT OF MARCH 3, 1903, STRIKE AT THE RIGHT OF THE PEOPLE TO ASSEMBLE AND AT THE RIGHT OF FREE SPEECH; AT THE RIGHT OF A GRAND JURY PRESENTMENT; AT THE RIGHT OF A PUBLIC TRIAL; AT THE RIGHT OF BEING CONFRONTED BY THE WITNESSES; AT THE RIGHT OF KNOWING THE ACCUSATION; AT THE RIGHT OF HAVING COUNSEL; AT THE RIGHT OF PROCURING WITNESSES IN THE PRISONER'S OWN BEHALF, AND AT THE VERY FORM AND ESSENCE OF LIBERTY ITSELF?

We respectfully refer the court to the opinion of Judge Ballinger, of the District Court of the United States for the District of Oregon on October 26, A. D. 1903, and found in the Fed. Rep. Adv. Sheets of January 28, 1904, at page 231, which seems to indicate a crying need for an authoritative expression by this court upon the right of aliens and others who are alleged to come within the scope of the immigration laws, and who are taken into custody by the officers charged with its administration.

Without, at the present time, discussing the numerous points which arise under this branch of the argument, it must be apparent that the appellant in this case was denied every right which the Constitution has explicitly thrown about every person who is charged in any way with something for which he is amenable to custody or imprisonment. This record shows, as before mentioned, that he was arrested upon the warrant of the Secretary of Commerce and Labor, and was not charged in any specific form by anyone with anything; that he was arrested by an inspector, who afterwards was

one of his judges, and who was, upon the trial before the immigration board, a witness against appellant. The supposed trial was held in secret, as provided specifically by the Act of March 3, 1903. He was denied the right of counsel, and had no means whatever of obtaining witnesses in his own behalf. We are aware of the fact that it has sometimes been stated that deportation is not a penalty, but it has also been stated that it is a penalty. If the appellant had remained in this country for two years, or under three years, and had acquired property and built up a business, or had married and established a home, it is difficult to conceive a greater penalty than that which would have compelled him to leave his domicile and abandon his surroundings and his business. In the appellant's case the penalty of deportation is not so severe, because the circumstances are different. But that a penalty has been imposed upon him seems to us to be beyond any sort of dispute. Those prosecutions are criminal in which a penalty is imposed, and so we say that the sixth amendment to the Constitution of the United States is violated by the Act of March 3, 1903. These matters will be fully dwelt upon when the argument proper is presented.

Form of the Bond.

We anticipate that the objection to admitting appellant to bail while this case is pending will be that the very object of the act of March 3, 1903, will thereby be defeated. It may be argued that if the appellant is admitted to bail that he necessarily will have the liberty to go where he likes within the confines of the United States, and that no power can prevent his discussing and talking upon such subjects as he pleases. This objection necessarily exposes the object

of the act of March 3, 1903; that is, that it seeks to abridge the freedom of speech. Yet appellant might be admitted to bail until this case can be decided, the condition of the bond to be that he depart from the United States and remain without its territory until this case is decided. Of course, if it is decided adversely to him, then he cannot return to the United States; but if it should be decided in his favor then he might return. But in the interval the case will be put in such condition by his leaving the United Sates and giving bond not to return unless the decision of this court shall be favorable that all questions will be put at rest. Or the form of the bond might be that he may remain in the United States, but not to deliver lectures or addresses while this cause is pending, or upon such other conditions as this court may determine. The affidavits show that ample bond can be given, in such sum as the court thinks proper, and may be given either in this court or in the Circuit Court for the Southern District of New York, as may be determined.

We also earnestly request the court to advance this cause for hearing so that even if the appellant is admitted to bail his rights may be as speedily determined as possible.

Respectfully submitted.

CLARENCE S. DARROW,
EDGAR L. MASTERS,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 561.

THE UNITED STATES *ex Rel.* JOHN TURNER, *Appellant*,

vs.

WILLIAM WILLIAMS, *United States Commissioner of Immigration, &c.*

AFFIDAVIT OF SAMUEL GOMPERS IN SUPPORT OF MOTION TO ADMIT TO BAIL.

UNITED STATES OF AMERICA:

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1903.

UNITED STATES *ex Rel.* JOHN TURNER
vs.
WILLIAM WILLIAMS, *Commissioner, &c.* } No. —.

SAMUEL GOMPERS, being first duly sworn, deposes and says: That he is of lawful age and is president of the American Federation of Labor and has his headquarters and office in the city of Washington, in the District of Columbia;

that in the year 1896, when this affiant was at the office of the American Federation of Labor in the city of Indianapolis, in the State of Indiana, he met the above-named John Turner, and that this affiant believes and remembers a meeting was called by the Central Labor Union of that city, and that the said John Turner addressed the said meeting, and this affiant presided at the same. This affiant further says that the said John Turner, at the said meeting, spoke and argued in favor of the organization of the working people into labor unions, and that there was nothing in the language used by the said John Turner at the said meeting in his said address intimating violence, disorder, force, revolution, or lawlessness of any sort; that he never at any time has heard the said John Turner discuss the subject of anarchy, philosophic or otherwise, and has never at any time in any of the conversations which he has had with the said John Turner in 1896, at Indianapolis, heard the said John Turner intimate or declare himself in favor of violence, disorder, force, revolution, or lawlessness, or advocate the violent overthrow of any government or the assassination of any officials of any government.

This affiant further says that the said Turner is a highly respected member of the London Union of Shop Assistants, which corresponds to the organizations of clerks of the retail stores of the United States of America.

That he recently received a letter from one James MacPherson, who is the general secretary of the Union of Shop Assistants, which letter is embodied and made a part of this affidavit as Exhibit "A;" and further affiant saith not.

SAM'L GOMPERS.

Subscribed and sworn to before me this 11th day of February, 1904.

[SEAL.]

HARRY S. WELCH,
Notary Public, D. C.

[Lithograph heading of National Amalgamated Union of Shop Assistants, etc.]

LONDON, W. C., *Jan. 14th*, 1904.

Mr. SAMUEL GOMPERS,
American Federation of Labour. Jan. 27, 1904.

DEAR SIR: At the last meeting of our executive, I was instructed to send you a cablegram as follows:—"Executive, representing 13,000 members National Union of Shop Assistants, meeting yesterday, protests against Turner's arrest and threatened deportation. Violation right free speech. Circulate widely American press. Macpherson. General secretary." This was dispatched on the 7th Jan'y and herein confirmed.

We have also written our foreign office, and the British ambassador at Washington city to do all in their power to assist in securing John Turner's release on bail, pending the decision of the Supreme Court of America.

With fraternal greetings,

Yours faithfully, JAS. MACPHERSON,
General Secretary.

"EX. A."

[Endorsed:] 561. United States *ex rel.* John Turner, appellant, *vs.* William Williams, com'r, etc., appellee. Darrow & Masters, attorneys for appellant, 1202 Ashland block, Chicago, Ill.

[Endorsed:] File No. 19,212. Supreme Court U. S. October term, 1903. Term No. 561. The U. S. *ex rel.* John Turner, app't, *vs.* Wm. Williams, U. S. com'r of immigration. Affidavit of Samuel Gompers. Filed Feb'y 23d, 1904.